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No. 401

In the Supreme Court of the United States

OCTOBER TERM, 1961

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

CELANESE CORPORATION OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Seventh Circuit entered in this case on June 14, 1961, following a remand from this Court.

OPINIONS BELOW

The original opinion of the court of appeals (App. B, *infra,* pp. 28–33) is reported at 279 F. 2d 204. The decision of this Court, vacating that judgment and remanding the case to the court of appeals, is reported at 365 U.S. 297. The opinion of the court below on remand (App. B, *infra,* pp. 22–26) is reported at 291 F. 2d 224. The findings of fact, conclusions of law, and order of the Board (J.A. 85–97, 103–105) [1] are reported at 125 NLRB 352. The

[1] "J.A." refers to the portion of the record printed as the Joint Appendix in the court below.

Board's decision in the representation proceeding (J.A. 64–72), which forms part of the record here, is reported at 121 NLRB 303.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 1961 (App. B, *infra,* p. 27). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act.

QUESTION PRESENTED

Whether, on remand to consider the case in the light of *National Labor Relations Board* v. *Mattison Machine Works,* 365 U.S. 123, the court below again misconceived the proper scope of judicial review in reversing the Board's determination that a representation election was held by the Board under circumstances which gave the employees power to make a free choice of representatives.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth in Appendix A, *infra,* pp. 19–21).

STATEMENT

A. THE BOARD REPRESENTATION PROCEEDING, AND THE SUBSEQUENT UNFAIR LABOR PRACTICE ORDER

On March 5, 1958, after the Textile Workers Union of America, AFL–CIO, herein called the Union, filed a representation petition with the Board, the respondent Company and the Union entered into an election

agreement. This agreement, approved by the Board's Regional Director, provided for an election to be held on March 12, in the Company's Gallipolis Ferry, West Virginia plant, to determine whether the production and maintenance employees wanted the Union to be their bargaining representative (J.A. 22, 64).

During the period from February 14 to March 8, the Company sent a series of 11 letters (J.A. 35–58) to each of the employees in the unit (J.A. 107–108). Eight of these letters were devoted to a discussion of the various "benefits" currently being received by employees. Many subjects were covered, ranging from wages (J.A. 49, 50, 56, 58), vacations, and paid holidays (J.A. 49–50), to the new lunchroom that was being built and the Company's contributions to an employee social club (J.A. 43–44). In its final letter, the company summarized the various benefits discussed in earlier letters, and restated its attitude toward them as follows (J.A. 56):

> These changes were made because of our progress as individuals working for our company and not because a labor organization demanded that they be done.

The Union replied to the Company's series of letters with two letters of its own on February 24 and March 10 (J.A. 59–63). The second letter was handed to twenty employees on March 10, and mailed to the other employees that evening and received the next day (J.A. 115). This letter began as follows (J.A. 61):

> DEAR FRIEND: The repetitious letters sent to you by the Plant Manager seem to betray an

> inner sense of guilt. In his letters, Mr. Pearson seems to be taking credit for almost everything but the Declaration of Independence.
>
> He says that all of the fine fringe benefits show the Company's interest in your concern. This could be something less than the truth, for the fact is that Celanese fringes, as well as other plant conditions, were won through collective bargaining and in many instances over the initial opposition of the Company.

The March 12 election was won by the Union, 25 to 22 (J.A. 6). The Company filed objections to the election, contending that the March 10 letter contained a "material misrepresentation made by the Union affecting the choice by employees," and that the employer had had no time to reply (J.A. 4). The Company asserted that the misrepresentation consisted of the Union's statement that "Celanese fringes, as well as other plant conditions, were won through collective bargaining * * *" (J.A. 8). Construing the Union's claim to have been that *all* the fringe benefits mentioned in the Company's letters were won through collective bargaining, the Company offered proof that a number of the matters discussed in its letters had never been contained in a collective bargaining contract at any of its plants (J.A. 9). The Regional Director, after investigation of the Company's objections, issued a report recommending that they be overruled (J.A. 11), whereupon respondent filed exceptions with the Board (J.A. 19–34).

The Board, upon review of the record, agreed with the Regional Director that the Union's letter did not

warrant setting the election aside (J.A. 64–71). The Board pointed out that, since it was undisputed that *some* of the benefits mentioned in the Company's letters were obtained through collective bargaining at the Company's other plants, the contention that the Union misrepresented the facts rested on the assumption that it was "claiming to have obtained, through collective bargaining with the [Company], *all* of the benefits, or at least all of the 'fringe benefits,' referred to in the [Company's] pre-election letters" (J.A. 67). The Board found that the Union's letter, on its face, showed that it was claiming only that some unspecified benefits referred to by the Company were obtained by collective bargaining. Moreover, when the Union's letter was read in the context of the Company's letters, the limited character of its claim was even clearer, for some of the benefits referred to by the Company "were of such a nature that the employees could not reasonably have believed that the [Union] was claiming credit for them" (J.A. 68). Accordingly, the Board concluded that the Union's letter did not in fact contain a misrepresentation.

Alternatively, the Board held that, even if the Company's reading of the Union letter were correct and the Union had misrepresented the facts, still the election should not be set aside (J.A. 68–71). The Board pointed out that it will not ordinarily police "campaign representations for their truth or falsehood but will allow the good sense of the employee to determine which are true and which are false" (J.A.

68–69). For employees voting in "hotly contested representations elections," like the voters in political elections, know that the parties "frequently make allegations during the campaign which would not be made by a disinterested historian" (J.A. 69). The Board has departed from this policy only when it was satisfied that the conditions necessary to full freedom of choice did not exist because the employees would be unable to evaluate the inaccuracy and it would be likely to affect their vote—e.g., where a material misrepresentation of fact was made so soon before the election that the other party could not reply, *and* the employees would give particular weight to the misrepresentation because it was made by one having special knowledge of the true facts. In the Board's view, the facts here did not fall within this exception. The Company's position was clearly set forth in its prior letters. And the employees knew that the Company, as a party to the prior contract negotiations, was as well informed as the Union on the question of what benefits ensued from bargaining. Thus, they would not be likely to attribute special weight to the Union's version.

Accordingly, the Board, on August 6, 1958, certified the Union as the collective bargaining representative of the employees in the unit (J.A. 71–72). Thereafter, the Company advised the Union that, until the Board's overruling of its objections to the election was "affirmed by the courts, we must defer recognizing your Union * * *" (J.A. 131–132). The Union filed unfair labor practice charges, and, in the ensuing proceeding, the Board affirmed its decision

in the representation case that the Union's letter of March 10 provided no basis for setting the election aside.[2] The Board therefore held that the Company's refusal to bargain with the duly certified Union violated Section 8(a) (5) and (1) of the Act, and ordered the Company to cease and desist from its unfair labor practice and to bargain, upon request, with the Union (J.A. 103–105, 85–87).

B. THE FIRST DECISION OF THE COURT OF APPEALS, WHICH WAS SET ASIDE BY THIS COURT

On June 16, 1960, the court of appeals declined to enforce the Board's order, concluding that the election was vitiated by the Union's misrepresentation in its March 10 letter (App. B, *infra*, pp. 28–33). In the court's view, the Union's letter claimed that *all* of the fringe benefits enjoyed by the employees were the result of collective bargaining, when in fact some were not, and thus contained a misrepresentation of fact. Noting that the Company had insufficient time before the election in which to reply to the Union's letter, the court concluded that "it cannot be said that the employees were acting under a correct understanding of the facts with respect to the manner in which employee benefits were gained at the time they cast their ballots. The election must, therefore, be held invalid" (App. B, *infra*, p. 33).

The Board petitioned this Court for a writ of certiorari. On February 20, 1961, this Court granted

[2] The Board adopted the findings of the Trial Examiner who, after fully reexamining the Company's contentions respecting the Union's letter, arrived at the same conclusion as had the Board in the prior representation proceeding (J.A. 85–97).

the Board's petition, vacated the judgment and remanded the case to the court below "for consideration in the light of *Labor Board* v. *Mattison Machine Works*" (365 U.S. 297).[3]

C. THE SECOND DECISION OF THE COURT OF APPEALS

On remand, the court below adhered to its original decision and declined to enforce the Board's order (App. B, *infra*, pp. 22–26). In the court's view, the sole question before it on the remand was "the scope of judicial review of orders of the Board respecting the validity of representation elections" (App. B, *infra*, p. 22). The court stated that its function on such review was no different from its function in reviewing unfair labor practice findings, i.e., to determine whether substantial evidence on the record as a whole supports the Board's decision. The court saw no conflict between the substantial evidence rule and the principle that the Board has wide discretion in determining the fairness of elections (App. B, *infra*, pp. 23–24):

> The Board's wide discretion lies in the initial promulgation of rules and regulations, while the court exercises its duties in reviewing decisions involving application of the Board's rules. Judicial review in these cases is not concerned with the wisdom of the Board's policy but must determine whether the record as a whole sup-

[3] In *Mattison*, 365 U.S. 123, discussed *infra*, the Court held that the court below had committed "plain error" in setting aside a Board election because of a slight discrepancy in the employer's name, which appeared on the election notices and the ballots.

ports the findings and conclusions respecting compliance with the policies, rules, and regulations promulgated by the Board.

Turning to the facts of this case, the court noted that the Board's policy is to set aside elections where a material misrepresentation has been made so soon before the election that the other side could not reply, and where the employees in all probability gave particular weight to the misrepresentation because the party making it had special knowledge of the true facts. The court held that the Board's finding that these elements were not present here, and that the election was valid, "were not supported by substantial evidence on the record as a whole" (App. B, *infra*, p. 25).

REASONS FOR GRANTING THE WRIT

1. We sought certiorari from the original decision in this case, as well as in *National Labor Relations Board* v. *Mattison Machine Works*, 274 F. 2d 347 (C.A. 7), because the cases revealed that the Seventh Circuit had an erroneous view of the function of a reviewing court in Board representation cases.[4] This Court granted the petition in *Mattison*, and, after hearing argument, issued a *per curiam* opinion in which it held that the Seventh Circuit had committed "plain error" by setting aside the Board election therein (365 U.S. 123). The Court then granted the petition in this case, vacated the judgment below, and remanded the case "for consideration in the light of" *Mattison* (365 U.S. 297). On remand, the court below

[4] See the Board's petitions for certiorari in Nos. 74 and 382, October Term, 1960.

adhered to its original decision. The second opinion makes it entirely clear that the court below still misconceives the standard of review applicable to Board representation determinations. Accordingly, the considerations which prompted this Court to grant certiorari in *Mattison* apply with equal force, if not more strongly, with respect to the Seventh Circuit's second decision in this case.

2. The heart of the Seventh Circuit's error is its failure to recognize the nature of the ultimate question in representation proceedings and also the breadth of the discretion which Congress has confided to the Board. The ultimate question is whether an election is a dependable expression of the employees' free choice of a bargaining representative. This question is one which Congress has delegated to the Board. In the words of this Court, Congress "has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *National Labor Relations Board* v. *A. J. Tower Co.*, 329 U.S. 324, 330. "The control of the election proceeding, and the determination of the steps necessary to conduct that election fairly were matters which Congress entrusted to the Board alone." *National Labor Relations Board* v. *Waterman Steamship Co.*, 309 U.S. 206, 226. Accordingly, the courts of appeals have repeatedly recognized that the function of a reviewing court with respect to such matters is confined to guarding against arbitrary or capricious

action by the Board, i.e., the Board's action is not to be disturbed unless it is unreasonable.[8]

The decision below shows that the Seventh Circuit's recent tendency to depart from this principle was not corrected by this Court's recent reaffirmation of that principle in *National Labor Relations Board* v. *Mattison Machine Works,* 365 U.S. 123.

The court below never addressed itself to the only proper question—whether the Board acted arbitrarily or capriciously in finding that the election was a dependable expression of the employees' free choice. Instead the court ruled that the election *must* be set aside if (1) there had been a material misrepresentation of fact; (2) coming from a party in an authoritative position to know the true facts; (3) at a time when the other party would have no opportunity to

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[8] *National Labor Relations Board* v. *Moyer & Pratt*, 208 F. 2d 624 (C.A. 2); *National Labor Relations Board* v. *National Container Corp.*, 211 F. 2d 525 (C.A. 2); *National Labor Relations Board* v. *Shirlington Supermarket*, 224 F. 2d 649 (C.A. 4), certiorari denied, 350 U.S. 914; *National Labor Relations Board* v. *National Plastic Products Co.*, 175 F. 2d 755 (C.A. 4); *Cone Brothers Contracting Co.* v. *National Labor Relations Board*, 235 F. 2d 37 (C.A. 5), certiorari denied, 352 U.S. 916; *National Labor Relations Board* v. *Capitol Greyhound Lines*, 140 F. 2d 754 (C.A. 6), certiorari denied, 322 U.S. 763; *National Labor Relations Board* v. *S. H. Kress & Co.*, 194 F. 2d 444 (C.A. 6); *Wilson Athletic Goods Mfg. Co.* v. *National Labor Relations Board*, 164 F. 2d 637 (C.A. 7); *Olson Rug Co.* v. *National Labor Relations Board*, 260 F. 2d 255 (C.A. 7); *Semi-Steel Casting Co.* v. *National Labor Relations Board*, 160 F. 2d 388 (C.A. 8), certiorari denied, 332 U.S. 758; *National Labor Relations Board* v. *National Truck Rental Co.*, 239 F. 2d 422 (C.A.D.C.), certiorari denied, 352 U.S. 1016; *Foreman & Clark, Inc.* v. *National Labor Relations Board*, 215 F. 2d 396, 409 (C.A. 9), certiorari denied, 348 U.S. 887.

correct the misrepresentation. These requirements are not laid down by the statute. The Board has set aside elections where all three were met, but always in situations where proof of these three facts satisfied the Board that the election was not free and fair (see pp. 15–17, *infra*). The court's mistake was to accept the Board's tests as absolute principles for the court's application, rather than as a formulation of the Board's own reasons for believing that an election might not be free and fair. Proceeding on this basis, the court next adressed itself to the question whether there had been a material misrepresentation and reversed the Board's finding on this point because the Board's "construction of written documents and undisputed evidence is not binding on this court." The court then ruled that the undisputed evidence satisfied the second and third requirements for voiding an election. It therefore set aside the order of the Board without discussing the reasonableness of the Board's ultimate conclusion that the election had been free and fair.

Each of these rulings misconceives the proper function of a reviewing court. The important question concerning the Union's letter was not its abstract meaning or legal effect, but the impact which it was likely to have upon the employees' minds. This was a question calling for an informed and experienced administrative judgment directed to the ultimate issue whether it was likely to render the election unfair. Similarly, the presence or absence of an opportunity to correct the misrepresentation furnished no legal

touchstone; its absence was unimportant if other aspects of the election campaign demonstrated that the total atmosphere was conducive to freedom of choice.

Although the court below relied upon *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, nothing in that decision supports its ruling. The *Universal Camera* case is concerned with the standard of review applicable to the Board's findings of fact in unfair labor practice cases. The Court held that the scope of review under section 10(e) of the Act is the same as the scope of review under section 10 of the Administrative Procedure Act, and declared that "a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view" (*id.* 488). This formula has not heretofore been applied to representation proceedings. The review of the findings of fact describing motives and evidence presents problems different from reviewing an administrative certification of representatives. In the former case the problem is largely one of weighing conflicting testimony, or the inferences to be drawn from testimony, under the circumstances disclosed by the record.[6] In a representation proceeding there is seldom much dispute about what happened; the agency makes a discretionary judgment based upon the evidence; the question on review is whether

[6] See *National Labor Relations Board* v. *Marcus Trucking Co.*, 286 F. 2d 583, 589–592 (C.A. 2).

that judgment was reasonable and was confined within the statutory limits.[7]

In the present case the record showed clearly what happened during the election campaign. The only question was whether the union's letter concerning fringe benefits precluded a fair election. The record did not disclose what effect the union's letter had on the employees, nor, in view of its highly subjective

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[7] For these reasons, Professor Jaffe, in his comment on the *Universal Camera* decision, stated that "it would be a drastic and unwarranted conclusion to read either Act [the NLRA or the APA] as impairing the long-standing doctrine that there are valid areas of administrative discretion and that judgment within these areas will be set aside only if unreasonable or arbitrary." Jaffe, *Judicial Review: "Substantial Evidence on the Whole Record,"* 64 Harv. L. Rev. 1233, 1260 (1951). It is also significant that Section 10(e) of the Administrative Procedure Act itself recognizes a distinction between a substantial evidence question and one involving the exercise of administrative discretion. Thus, it provides that the reviewing court shall "(B) hold unlawful and set aside agency actions, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; * * * (5) unsupported by substantial evidence * * *"

The same distinction was drawn by Judge Parker in *National Labor Relations Board* v. *National Plastic Products Co.*, 175 F. 2d 755, 758 (C.A. 4):

"The determination of bargaining representatives under the act is a matter that Congress has entrusted to the Board, not to the courts; and when, as here, a certification is called in question in connection with a petition to enforce or review an order of the Board under section 10 * * * the certification must be sustained in so far as fact questions are concerned, if the fact findings of the Board made in connection therewith are based upon substantial evidence. In so far as the certification involves the exercise of discretion, that is a matter with which we are powerless to interfere so long as the Board acts within the limits of the law."

And see *International Telephone and Telegraph Corp.* v. *National Labor Relations Board* (C.A. 9), August 28, 1961.

nature, is it likely that evidence on this issue would have probative value (cf. *N.L.R.B.* v. *Donnelly Garment Co.*, 330 U.S. 219, 231). Under these circumstances it was pointless to ask whether there was substantial evidence to support a finding that the employees were not misled. The Board made an independent judgment upon whether the letter, under all the circumstances of this election campaign, was likely to have affected true freedom of choice. The Board's conclusion reflected its appraisal of the objective facts measured against its standard of free and fair elections. Under these circumstances the reviewing court should only inquire whether the Board could reasonably conclude that employee free choice was not affected; if so, its judgment should not be distrubed even though the court may have reached the opposite conclusion if it were free to decide the question *de novo*.

Instead of following this course, the court below simply substituted its judgment for that of the Board. The court admittedly undertook to interpret the Union's letter *de novo* even though the Board had found it to have a different meaning. Finding that the Union had made a misstatement in the closing moments of the election campaign, the court compounded the error by ruling that this must necessarily have had an effect on the employees and impaired the validity of the results even though, as we show *infra*, pp. 16–17, the opposite conclusion had been reached by the Board and was not unreasonable.

3. The Board does not set aside every election involving untruthful statements by one of the parties.[8] The policy of nonintervention rests on the realistic

[8] See cases cited at J.A. 69, notes 11, 13.

premise that the employees, as a result of their common sense and experience in political elections, have learned that hyperbole and inaccuracies usually accompany an intense campaign and therefore can be trusted to evaluate and discount the conflicting claims that are made preliminary to a representation election. Where special circumstances occur, however, which impair the ability of the employees to evaluate the propaganda—e.g., where both a material misrepresentation has been made so soon before the election that the other side could not reply *and* the employees in all probability gave particular weight to the misrepresentation because the party making it had special knowledge of the true facts—this premise is no longer true, and the Board will ordinarily require a new election. See *Merck & Co.*, 104 NLRB 891, 892; *Gummed Products Co.*, 112 NLRB 1092, 1093–1094. But the Board could reasonably conclude that the employees were not misled here, and thus that a new election was not necessary. Although the alleged misstatement occurred in the closing moments of the campaign so that the Company did not have a chance to reply prior to the election, no reply was required to counter the effect of the Union's statement. As the Board pointed out (J.A. 92–93, 68–71), the Company had outlined its position that past employee benefits were the result of its voluntary action and not of collective bargaining, in the series of letters sent to the employees. The Board (J.A. 67–68) read the Union's letter to claim only that *some* of the benefits were the result of Union negotiations. As so interpreted, it is neither incorrect nor did it conflict with

the contentions made by the Company in its series of letters. Alternatively, the Board found (J.A. 68–71) that, even if the Union's letter be read as claiming that *all* the benefits were attributable to the Union's efforts, as did the court below, the employees were, at most, presented with conflicting contentions which they were free to evaluate. The Company was claiming that the benefits were the result of its voluntary action and the Union, that they were the result of collective bargaining. Now was it likely that the employees would attribute more significance to the Union's version than to the Company's. Since the Company was a party to the past negotiations, the employees could not help but recognize that it was in as good a position as the Union to know what had occurred. Moreover, as the Board noted, the benefits in question themselves showed that some of them could not conceivably have been initiated by the Union (see J.A. 68, n. 9). In these circumstances, it was clearly "within the Board's province to find" (*National Labor Relations Board* v. *Mattison Machine Works,* 365 U.S. 123) that the Union's inaccuracy (if any) on this "not too important dispute"[9] did not affect the freedom or fairness of the election.

4. As shown in the petition in *Mattison* (No. 74, October Term, 1960, pp. 7–8, 11), thousands of representation elections are conducted each year by the Board. Under the decision of the court below, reviewing courts might set aside many of them on the

[9] The controversy here was so characterized by the Sixth Circuit in *Cross Company* v. *National Labor Relations Board,* 288 F. 2d 188, in distinguishing it from the situation in that case.

basis of exaggerated or erroneous campaign claims despite the lack of any evidence showing actual prejudice, and despite the finding of the Board, based on its extensive experience in election matters, that the erroneous claims did not affect the result. If these elections are set aside because of the reviewing court's evaluation as to when prejudice is likely to result, the election machinery, which the statute provides for the speedy resolution of representation questions, will be delayed by time-consuming litigation. This, in turn, will impair the collective bargaining process, since delay in determining the employee representatives with whom the employer must bargain encourages industrial unrest. It is therefore important to the overall administration of the Act that the decision below be reversed.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER, 1961.

APPENDIX A

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are as follows:

> SEC. 8. (a) It shall be an unfair labor practice for an employer—
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).
>
> * * * * *
>
> SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.
>
> * * * * *
>
> (c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—
>
> (A) by an employee or group of employees or any individual or labor organization acting

in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a) * * * the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * *

SEC. 10. * * *

* * * * *

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the

order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

APPENDIX B

In the United States Court of Appeals for the Seventh Circuit

September Term, 1960—April Session, 1961

No. 12857

CELANESE CORPORATION OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

June 14, 1961

Before SCHNACKENBERG and CASTLE, *Circuit Judges*, and GRUBB, *District Judge*

GRUBB, *District Judge.* The judgment heretofore entered in this case, *Celanese Corporation of America* v. *National Labor Relations Board,* 279 F. 2d 204 (7th Cir. 1960), has been vacated by the Supreme Court, 365 U.S. 297 (1961), and the case has been remanded for consideration by this court in light of *National Labor Relations Board* v. *Mattison Machine Works,* 365 U.S. 123 (1961). Reference is made to the previous decision in 279 F. 2d 204 for a statement of facts.

The case now turns on the question as to the scope of judicial review of orders of the Board respecting the validity of representation elections.

Section 10(e) of the Labor Management Relations Act, 1947, 29 U.S.C. Section 160(e), which is similar to the provisions of the Administrative Procedure Act, requires that the court determine the substantiality of the evidence supporting a Labor Board decision on the record as a whole.

In interpreting this section, *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474 (1951), admonishes the Courts of Appeals of their duties in reviewing Labor Board orders. The courts are to assume more responsibility for the reasonableness and fairness of Board decisions than some courts have previously shown. It is said on pages 490 and 491 that:

> * * * The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both.
>
> * * * * *
>
> * * * Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. * * *

There is no conflict or contradiction between the substantial evidence rule determinative of the scope of review and the principle whereunder the Board is entrusted with wide discretion in establishing the procedures and safeguards necessary to insure the fair and free choice of bargaining representatives as enunciated in *National Labor Relations Board* v. *A. J. Tower Co.*, 329 U.S. 324, 330 (1946). These rules do not conflict because they affect differing spheres of activity. The Board's wide discretion lies

in the initial promulgation of rules and regulations, while the court exercises its duties in reviewing decisions involving application of the Board's rules. Judicial review in these cases is not concerned with the wisdom of the Board's policy but must determine whether the record as a whole supports the findings and conclusions respecting compliance with the policies, rules, and regulations promulgated by the Board.

Unless or until Congress changes the language of the statute or the Supreme Court changes its interpretation of the application of the statute, this court is bound by the rule of the *Universal Camera* case.

On oral argument counsel for the Board took the position that the scope of review by Courts of Appeals of orders of the Board as to representation elections was extremely narrow and that the Board's orders should not be set aside unless clearly arbitrary or capricious. Counsel could not think of an example of extreme arbitrariness or capriciousness which, in his opinion, would warrant setting aside an order. This position is far from the interpretation placed on the statute by the United States Supreme Court in the *Universal Camera* case.

In accordance with the "wide discretion" entrusted to it, the Board has adopted the policy to set aside a representation election where it appears that (1) there has been a material misrepresentation of fact, (2) this misrepresentation comes from a party who had special knowledge or was in an authoritative position to know the true facts, and (3) no other party had sufficient opportunity to correct the misrepresentations before the election. *United States Gypsum Company*, 130 N.L.R.B. No. 99; *The Cleveland Trencher Company*, 130 N.L.R.B. No. 59; *Kawneer Company*, 119 N.L.R.B. 1460; *The Calidyne Company*, 117 N.L.R.B. 1026, 1028. Where these ele-

ments are present, the Board has found that the legitimate limits of campaign propaganda have been exceeded and has set aside the election on the ground that it does not reflect the free desires of the employees without further requiring that prejudice to the fairness of the election be shown.

In the case before the court, the validity of a representation election was put in issue by allegations as to the three elements prejudicial to the fairness of an election under the doctrine set forth above. Without making a determination as to the truth or falsity of the statements in question, the Board found that the additional elements were lacking in the case and concluded that the election was valid.

This court, on the entire record encompassing a series of letters addressed to the employees, including the challenged eve-of-the-election letter as well as certain undisputed testimony concerning collective bargaining between the employer and the union at other plants, holds that the findings and conclusions of the Board as to the validity of the election were not supported by substantial evidence on the record as a whole.

This court's prior opinion was principally concerned with the question of the truth or falsity of the challenged statement. The statement as to the source of fringe benefits was material to voting employees. The union was a party in an authoritative position to know the true facts as to benefits it falsely claimed to have gained through collective bargaining. The union would not have made such statements if it had not believed that they would be material in influencing the vote. There was no time for rebuttal of the false statement.

On this remand, the Board has not challenged this court's finding that there were misrepresentations of

fact. The Board's construction of written documents and undisputed evidence is not binding on this court. An election must be set aside where, as here, the three elements set forth above are present. Under these circumstances, there is interference with the employees' freedom of choice of bargaining representative. It has been conceded by the Board that it would have been as improper for the employer to have canvassed the employees to ascertain why or how they voted as it would be to similarly question voters after casting their secret ballots in other elections.

Considering the instant case in light of *National Labor Relations Board* v. *Mattison Machine Works, supra,* it appears that in the latter case a conclusion of prejudice to the fairness of the election was based on trivial administrative irregularities. In *Mattison* this court refused to enforce the order because the Board's notices of election contained a minor and unconfusing mistake in the employer's corporate name, which error the Supreme Court held did not affect the fairness of the election in the absence of a contrary showing by the employer. However, this court can now find no basis for holding that "trivial irregularities of administrative procedure" and material misrepresentations of fact made under the circumstances revealed by the record in the instant case are of the same kind and nature, equally requiring further evidence in support of prejudice to the fairness of the election. This is particularly true when a change of two votes would have changed the outcome of the election.

For the foregoing reasons the order of the Board is hereby set aside and enforcement is denied.

United States Court of Appeals for the Seventh Circuit

CHICAGO 10, ILLINOIS,
Wednesday, June 14, 1961.

No. 12857

CELANESE CORPORATION OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*, Hon. LATHAM CASTLE, *Circuit Judge*, Hon. KENNETH P. GRUBB, *District Judge*

This cause came on to be heard on the record from the National Labor Relations Board and was argued by counsel, subsequent to remandment to this Court by the Supreme Court of the United States for further proceedings in conformity with the opinion of said Court.

On consideration whereof, it is ordered by this Court that the order entered in this cause by the National Labor Relations Board on November 25, 1959, be, and the same is hereby set aside; and enforcement of said order is hereby denied, in accordance with the opinion of this Court filed this day.

In the United States Court of Appeals for the Seventh Circuit

September Term, 1959—April Session, 1960

No. 12857

CELANESE CORPORATION OF AMERICA, PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT.

ON PETITION TO REVIEW AND SET ASIDE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD AND CROSS-APPLICATION OF THE BOARD FOR ENFORCEMENT OF SAID ORDER.

June 16, 1960

Before SCHNACKENBERG and CASTLE, *Circuit Judges,* and GRUBB, *District Judge.*

GRUBB, *District Judge.* On petition to review and set aside an order of the National Labor Relations Board and cross-application of the Board for enforcement of said order.

The order in issue requires the Celanese Corporation of American (hereinafter called the "Company") to bargain collectively with the Textile Workers Union of America, AFL-CIO (hereinafter called the "Union"), on behalf of certain of the Company's employees at its Point Pleasant plant, following Board certification of the Union as the employees' majority representative. The Company based its refusal to bargain on the alleged invalidity of the election and certification arising out of pre-election activities by the Union.

In the election held on March 12, 1958, among the approximately forty-eight employees in the bargaining unit at the Point Pleasant plant, twenty-five votes favored the Union while twenty-two opposed it.

During the pre-election period the Company sent a series of eleven letters, addressed individually to each employee who was involved in the election and signed on behalf of the Company by Paul C. Pearson, Plant Manager, Point Pleasant plant. The first letter, dated February 14, 1958, expressed the Company's view that the employees did not need the Union to speak on their behalf in their relationship with the Company. Subsequent letters in support of this view explained and described Company policies as to employee benefits and working conditions. The Company's final letter, dated March 8, 1958, summarizes the previous correspondence as dealing with policy in respect to job security, working conditions, seniority and promotions, group insurance, vacations, holidays, and job descriptions. It continues to describe changes in the wage program and wage increases since the plant began operations in 1956 and further states that these changes were made through individual progress and "not because a labor organization demanded that they be done."

The Union replied to the Company's communications with two letters, the latter of which, dated March 10, 1958, reads in part as follows:

> DEAR FRIEND: The repetitious letters sent to you by the Plant Manager seem to betray an inner sense of guilt. In his letters, Mr. Pearson seems to be taking credit for almost everything but the Declaration of Independence.
>
> He says that all of the fine fringe benefits show the Company's interest in your concern. This could be something less than the truth, for the fact is that Celanese fringes, as well as other plant conditions, were won through collective bargaining and in many instances over the initial opposition of the Company.

The letter was signed by Morris Riger, Regional Director.

It was stipulated that about twenty copies of this letter were delivered by hand to employees at their homes on the afternoon of March 10, 1958, and that the remainder were deposited in the mail box outside the Point Pleasant Post Office about 6:30 p.m. on March 10, 1958. The Company first saw a copy of this letter about 1:30 p.m. on March 11, 1958. The plant manager testified that a number of employees were not readily available at this time or in the interval before the polls opened at 6:30 a.m. on March 12, 1958.

The Company objects to the election on the ground that the above-quoted portion of the Union's letter contained a material misrepresentation of fact, made within twenty-four hours of the election at a time which did not permit the Company to acquaint the employees of the misrepresentation. A hearing was had on this objection in conjunction with the unfair labor practice proceeding based on the Company's refusal to bargain.

The Trial Examiner held that the challenged letter did not invalidate the election. He concluded that the letter could reasonably be read as a claim by the Union that "some" Celanese fringes were won through collective bargaining when viewed in the light of the Company's previous letters since some of the benefits discussed were of such nature that the employees could not reasonably have believed that the Union was claiming credit for them. Even if the Company's interpretation of this language as reading that "all" Celanese fringes were won through collective bargaining were accepted, the Trial Examiner believed that the Union's claim at most amounted to a "half-truth." He did not make a specific finding as to the truth

or falsity of the Union communication. The Board adopted the Trial Examiner's report and recommendation and issued the order being reviewed here.

This court does not agree with the holding of the Board. The content of the Union's communication to the employees and the manner of its distribution go beyond the bounds of "legitimate propaganda." These activities fall below the standard to be observed in representation elections as set forth by the Board and as approved by the courts. See *The Gummed Products Company,* 112 N.L.R.B. 1092; *The Matter of General Shoe Corp.,* 77 N.L.R.B. 124; and *Kearney & Trecker Corp.* v. *National Labor Relations Board,* 210 F. 2d 852 (7th Cir. 1954).

In light of the immediately preceding reference to "all of the fine fringe benefits," the challenged statement cannot reasonably be construed to refer to less than "all" Celanese fringes. If the author had intended to speak of some or several benefits, he would necessarily have had to employ a limiting adjective. The record establishes that some Celanese benefits, as for example the group insurance and retirement pension plans, were initiated and maintained unilaterally by the Company, while other benefits, such as vacations, holidays, pay for jury duty and funeral leave, had been the subject of collective bargaining by the Company and labor organizations at other plants. There had been no union and no negotiations with any union concerning the particular employees involved at the Point Pleasant plant. Apparently the Union is referring to some dealings of the Company and unions at other plants.

The Trial Examiner had concluded that the Company's letters carried the implication that the Company voluntarily granted the benefits discussed in the correspondence without benefit of collective

bargaining. The claim in the Company's final letter that certain changes were made because of individual progress rather than as a result of a union demand refers to changes in wages discussed immediately preceding this statement. Clearly, the Company was attempting to convey the impression that the employees were enjoying existing benefits and working conditions without present Union representation at the Point Pleasant plant, while the Union points out that these gains have been derived as a result of prior Union activities. In this context, a claim by the Union that "all" Celanese fringes were the result of collective bargaining is significant and material. Where it has been established that some of the fringes had not thus been obtained, the claim is a misrepresentation of fact, the falsity of which was known to the Union. Characterizing the claim as a "half-truth" does not confer upon it the veracity demanded in respect to material statements made immediately prior to a representation election. *Allis-Chalmers Mfg. Co.* v. *National Labor Relations Board,* 261 F. 2d 613 (7th Cir. 1958). Nor may a false statement be excused on the ground that it was in answer to prior Company statements carrying possibly erroneous implications. See *United Aircraft Corp.,* 103 N.L.R.B. 102.

The misrepresentation of fact here does not fall within the pre-election publicity "prattle" condoned in *Olson Rug Co.* v. *National Labor Relations Board,* 260 F. 2d 255 (7th Cir. 1958), where the challenged statements concerned predictions of the future.

The Trial Examiner conceded that the Company did not have sufficient time before the election to reply to the Union's final letter. The election was close; a shift of two out of forty-seven votes cast would have altered the result. Under the facts of

this case, it cannot be said that the employees were acting under a correct understanding of the facts with respect to the manner in which employee benefits were gained at the time they cast their ballots. The election must, therefore, be held invalid. See *National Labor Relations Board* v. *Trinity Steel Co., Inc.*, 214 F. 2d 120 (5th Cir. 1954).

This conclusion makes unnecessary a consideration of other objections raised by the Company.

Order set aside and cross-application for enforcement denied.

U.S. GOVERNMENT PRINTING OFFICE: 1981